ET Mix Sdn Bhd v Sun Steel Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — WINDING UP PETITION NO D2–28–242 OF 1995

MOKHTAR SIDIN JCA

20 APRIL 2005

Companies and Corporations — Winding up — Petition under s 218 — Adjournments allowed on basis that respondent awarded sum of money in arbitration proceedings — Respondents failed to pay petitioner — Whether respondent made use of court to delay petition in order to collect award — Whether winding up petition to be allowed

This was an application by the petitioner to wind up the respondent under the Companies Act 1965 after the respondent was unable to pay its debts of RM809,100.66 to the petitioner. The respondent admitted to owing the petitioner but claimed that the petitioner had agreed to defer the payment.

The respondent's solicitors managed to obtain an initial adjournment of the hearing of the petition on the basis that the arbitration proceedings between the respondent and a third party had been completed and was awaiting the decision of the arbitrator and that the award prayed for by the respondent in the arbitration exceeded the amount owed to the petitioner. When the petition came up for hearing later, the respondent's counsel submitted that the arbitrator had awarded a sum exceeding RM5 million to the respondent and requested for a further adjournment in order for the respondent to recover the money from the third party. The court accordingly adjourned the matter to another date.

On the next hearing date, the respondent's counsel again requested for an adjournment on the basis that the High Court had given the order to execute the award. On the strength of that court order, the respondents' solicitors informed the court that the third party had offered to pay the award by monthly instalments of RM1 million and as such it would take six months to recover the full amount due under the award. Therefore, the petition was adjourned for another six months.

When this matter came up for hearing again, the respondent's counsel again asked for an adjournment of a further six months and undertook to release a sum of RM500,000 to the petitioner's solicitors. The matter was accordingly adjourned.

However, when the petition came up for hearing subsequently, counsel for the respondent submitted that the respondent could not pay the creditors. There was no mention of the award money despite the solicitor's undertaking given earlier.

Held, allowing the application:

(1) Although the issue of deferred payment was raised, the petitioner did not agree to the deferred payment because the respondent could not meet one of the conditions. Even assuming that there was an agreement to defer the payment, it was to be deferred only until the award by the arbitrator (see para 19).

(2) The respondent had received the award amounting to almost RM6 million. However, after the award was recovered, the respondent did not pay the amount of RM809,100.66 to the petitioner despite the undertaking by the respondent's solicitors to deposit a sum of RM500,000 with the petitioner's solicitors (see para 19).

(3) Both the respondent and its solicitors were making use of the court to delay the petition in order for the respondent to collect the award. Instead of paying the creditors, the respondent dissipated the award (see para 23).

[**Bahasa Malaysia summary**

Ini merupakan permohonan oleh pempetisyen untuk menggulungkan responden di bawah Akta Syarikat 1965 setelah responden gagal membayar hutangnya sebanyak RM809,100.66 kepada pempetisyen. Responden mengaku bahawa wang tersebut memang dihutangkan kepada pempetisyen tetapi menyatakan bahawa pempetisyen telah bersetuju menunda pembayaran hutang tersebut.

Peguamcara responden berjaya memperoleh penangguhan permulaan perbicaraan petisyen tersebut atas sebab prosiding timbangtara di antara responden dan pihak ketiga telah tamat dan responden menunggu keputusan penimbangtara serta award yang dipohon oleh responden di dalam timbangtara tersebut melebihi jumlah yang dihutangkan kepada pempetisyen. Apabila petisyen tersebut timbul di perbicaraan kemudian, peguambela responden berhujah bahawa penimbang tara telah memberi responden sejumlah wang yang melebihi RM5 juta dan peguam bela tersebut juga memohon satu penangguhan yang baru supaya responden boleh mendapatkan wang tersebut daripada pihak ketiga. Mahkamah membenarkan permohonan penangguhan tersebut.

Pada tarikh pembicaraan yang seterusnya, peguambela responden sekali lagi memohon untuk penangguhan atas sebab Mahkamah Tinggi telah memberi perintah untuk menyempurnakan award tersebut. Dengan perintah tersebut, peguamcara responden telah memberitahu mahkamah bahawa pihak ketiga tersebut telah membuat tawaran untuk membayar award tersebut dengan bayaran ansuran bulanan sebanyak RM1 juta dan oleh itu, responden memerlukan enam bulan untuk mendapat kembali wang yang dihutangkan di bawah award tersebut. Oleh kerana itu, petisyen tersebut ditangguh untuk tempoh enam bulan berikutnya.

Apabila perkara ini timbul untuk perbicaraan sekali lagi, peguambela responden sekali lagi memohon penangguhan sebanyak enam bulan lagi dan memberi akujanji untuk memberi RM500,000 kepada peguamcara pempetisyen. Dengan itu perkara tersebut ditangguhkan sekali lagi.

Namun, apabila petisyen timbul untuk perbicaraan kemudian, peguambela responden berhujah bahawa responden tidak boleh membayar hutang mereka. Tidak ada sebarang pernyataan mengenai wang di bawah award tersebut walaupun terdapat akujanji tersebut.

Diputuskan, membenarkan permohonan tersebut:

(1) Walaupun isu penundaan pembayaran telah dikemukakan, pempetisyen tidak setuju dengan penundaan pembayaran kerana responden tidak boleh mematuhi satu daripada syarat perjanjian untuk menunda. Walaupun andaian dibuat bahawa terdapat perjanjian untuk menunda pembayaran, penundaan tersebut hanyalah hingga award tersebut diberi oleh penimbang tara (lihat perenggan 19).

(2) Responden telah menerima award yang berjumlah hampir RM6 juta. Namun, setelah award tersebut diperolehi, responden tidak membayar hutangnya sejumlah RM809,100.66 kepada pempetisyen walaupun terdapat akujanji daripada peguamcara responden untuk mendeposit sejumlah RM500,000 dengan peguamcara pempetisyen (lihat perenggan 19).

(3) Kedua-dua responden dan peguamcara responden telah menggunakan mahkamah untuk melambatkan petisyen tersebut untuk membolehkan responden mendapat award tersebut. Disebalik membuat pembayaran kepada si pemiutang. responden telah menyusutkan award tersebut (lihat perenggan 23).]

Notes

For cases on winding up of petitions under s 218 of the Companies Act 1965, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1229–1249.

For cases on winding up of petitions, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1152–1219.

Cases referred to

South Seas Development Ltd v Commercial Advances Nominees Ltd [1976] 1 NZLR 679 (refd)

Weng Wah Construction Co Sdn Bhd v Yik Foong Development Sdn Bhd [1994] 2 MLJ 266 (refd)

Legislation referred to

Companies Act 1965 s 218(2)(a)

Stanley Sinnappen (Isharidah, Ho, Chong & Menon) for the petitioner.
Azhar Azizan Harun (Azhar & Goh) for the respondent.
Rozaidah (Jabatan Pemegang Harta, Kuala Lumpur) for the Receiving Officer.

Mokhtar Sidin JCA:

[1] This is an application by the petitioner (ET Mix Sdn Bhd) to wind-up the respondent (Sun Steel Construction Sdn Bhd) under the provisions of the Companies Act 1965. According to the petition the respondent company was incorporated under the Companies Act 1965 ('the Act') on 12 June 1985 and have its registered office at No 52 (3rd Floor), Jalan Hang Lekiu, 50100 Kuala Lumpur. The petition also stated that at the time of filing the petition the respondent was indebted to the petitioner in the sum of RM809,100.66. On7April 1995 the petitioner sent to the respondent a demand for the said sum by AR registered post. The respondent failed to pay the said sum within 21 days as stated in the notice. With that failure the respondent was deemed to be unable to pay its debt. For that reason, the petitioner petitioned that it was just and equitable that the respondent should be wound-up. The petition was filed on 29 July 1995.

[2] On 21 October 1995 the respondent filed an affidavit affirmed by MrTeoh Seow Weng, the respondent's managing director, opposing the petition. In the affidavit the respondent admitted it had not paid the petitioner the sum due but averred that the petitioner had agreed to defer the payments of the whole or part of the debt. The material parts of the affidavit explains that the respondent is a construction company involved mainly in piling and substructure works. On 20 January 1993, the respondent was awarded a subcontract the piling and substructure works for the sum of RM13.75 million by MBf Builders Sdn Bhd, the main contractors in a project known as the Menara Budaya Project ('the first project'). The respondent admitted that the petitioner did supply ready-mixed concrete to the respondent from March 1993 until November 1993. The petitioner ceased to supply ready-mixed concrete at the end of November 1993 when the main contractor wrongfully terminated the subcontract of the respondent. After the termination Mr Teoh Seow Weng met Mr Edwin Thiagaraj Palan a/l S Thiophilus Palan, a director of the petitioner, and MrTeoh informed the latter that the respondent had not been paid by the main contractors in respect of three progress payments amounting to a few million ringgit. Mr Teoh also informed Mr Palan that at that moment the respondent was not able to pay the petitioner the amount due to the petitioner. The respondent would only be able to recover the money after the conclusion of the arbitration between the respondent and the main contractor. Mr Teoh also informed Mr Palan that the respondent had been awarded another subcontract to do piling and substructure works in respect of a project known as the Kuala Lumpur Stock Exchange (KLSE) Project ('the second project'). Mr Teoh then proposed to defer the payment under the first project until the arbitration award. In addition, the respondent also proposed to appoint the

petitioner as the supplier of ready-mixed concrete in the second project. The respondent also proposed to pay the amount due under the first project with whatever amount available from the progress payments under the second project after paying the goods supplied by the petitioner in the second project. According to the affidavit of the respondent the petitioner agreed to that arrangement. The affidavit further stated that under that arrangement the amount paid by the respondent amounting to RM744,735.50 consisting of RM374,318.86 for goods supplied under the second project and RM370,416.64 as part payment of the amount due to the petitioner under the first project. The respondent further claimed that it had kept its part of the bargain. Theaffidavit of the respondent stated that sometime in 1995, Mr Palan invited Mr Teoh for a meeting over lunch. At that meeting, attended by MrChong, Mr Palan and Mr Teoh, it was explained to Mr Teoh that both MrChong and Mr Palan had disposed of their majority shareholding to a third party who had pressured both of them to collect the debt due under the first project within six months and not to wait until the arbitration award. MrTeoh offered to give his personal guarantee as well as unencumbered vehicles and machineries as security if the respondent would defer the collection of the debt due under the first project until the conclusion of the arbitration. Despite this, the petitioner's solicitors called up the respondent's solicitors informing the latter that the new majority shareholder insisted that Mr Teoh's wife to give her personal guarantee. This was rejected by Mr Teoh, Before the meeting between Mr Teoh, Mr Chong and Mr Palan which took place on 24April 1995, the petitioner's solicitors had, on 6 April 1995, sent a notice of demand pursuant to s 218(2)(a) of the Act. When Mr Teoh rejected the proposal that his wife to give her personal guarantee, the petitioner filed a petition to wind-up the respondent and the petition was advertised in the local newspapers. The respondent claimed that this was an abuse of the process of the court.

[3] In the same affidavit, the respondent claimed that the petitioner had overcharged the respondent a sum of RM35,709.80 because the petitioner increased the price from the one agreed upon under the contract. The respondent also claimed that the amount under the arbitration exceeded the debt due to the petitioner. The respondent then prayed that the petition be dismissed.

[4] On 26 October 1995, the petitioner filed an affidavit-in-reply affirmed by Mr Edwin Thiagaraj Palan a/l S Thiophilus Palan. He deposed that the respondent was indebted to the petitioner in the sum of RM809,100.66. Hedenied that the petitioner agreed to defer the payment as stated in the respondent's affidavit opposing the petition. Mr Palan also denied meeting Mr Teoh Seow Weng on 26 November 1995 but admitted having a lunch meeting with Mr Teoh. Mr Palan also stated that instead of agreeing to the request to defer the payment, he impressed upon Mr Teoh to settle the amount due promptly. Mr Palan further stated that before the arbitration the respondent had been paid substantial sum of money by MBf Builders.

MrPalan also stated in the affidavit that the second project was awarded to the respondent before the first project was terminated and as such it is not true as what had been stated in the affidavit of the respondent. This indirectly denied that there was an arrangement for the payment of the debt due under the first project from progress payments under the second project. Mr Palan also denied that he asked the respondent to pay the debt within six months but it was Mr Teoh who asked for a deferment of six months. Mr Palan agreed to the request subject to the securities stated by Mr Teoh and also the personal guarantees of Mr Teoh and his wife. Mr Palan went on to say that the securities were never given despite the petitioner's solicitor's letter requesting the securities to be deposited.

[5] In respect of the price increase, Mr Palan stated that the respondent was informed of the price increase on 8 June 1993 and that when the respondent accepted the goods by conduct acquiesced to it. The respondent is therefore estopped from disputing the price increase.

[6] On 7 November 1995 the respondent filed further affidavit opposing the petition. This affidavit was affirmed by Mr Kok Beng Hoong. This affidavit was in respect of the overcharged price. On the same date, Mr Wong Hai Wai, the solicitors for the respondent filed an affidavit confirming the meeting that was held between the parties where the request to defer the payment by six months was made and the petitioner's request for security including Mr Teoh's wife's personal guarantee where Mr Teoh categorically stated that his wife's personal guarantee was out of the question. As to the other securities, the registration cards of those vehicles were sent to the solicitors for the petitioner on 6 June 1995.

[7] On 10 November 1995, Mr Teoh Seow Weng filed another affidavit where he denied that the respondent had received substantial sum of money in November 1993 from MBf Builders in respect of the first project.

[8] On 11 November 1995, two creditors filed their notices of intention to appear in support of the petition. On 13 November 1995 and 14 November 1995, 19 other creditors filed their notices of intention to appear to oppose the petition. It is to be noted all the 19 notices were filed by the solicitors acting for the respondent.

[9] When this matter came up for hearing before me on 15 November 1995, Mr Cheow Wee appeared for the petitioner. He also mentioned on behalf of the solicitors for MBf Builders. Mr Visvanathan and Mr Yong Chee Kong appeared for the respondent and the 19 other creditors. Mr Visvanathan requested for one month adjournment to which the counsel for the petitioner had no objection. The matter was then adjourned.

[10] On 24 January 1996, Mr Teoh Seow Weng filed further affidavit opposing the petition. That affidavit exhibited the respondent's final account

ending 31 December 1994 showing that the respondent was insolvent to the extent of RM4,281,784.41 and the assets as on that date would be insufficient to pay the petitioner and all other unsecured creditors. Despite this averment Mr Teoh prayed that the respondent ought not to be wound-up because in winding-up the respondent, it would not assist the petitioner and the other unsecured creditors to obtain payments in respect of their debts. Mr Teoh went on to state that the respondent, if not wound-up, would be able to resolve its financial difficulties.

[11] On 29 January 1996 and 30 January 1996, 12 of the creditors who had filed notices to oppose filed their affidavits as to why they opposed the winding-up of the respondent. The only ground given in those affidavits was that the respondent should be allowed to prosecute MBf Builders for the progress payments which were still unpaid. This matter was still with arbitration. On 26 January 1996, Mr Palan, on behalf of the petitioner, filed further affidavit where it was stated that the respondent had admitted its inability to pay its debts due to its financial difficulties. As for the respondent's ability to negotiate further contracts and to pursue the two pending arbitrations it was mere speculation and presumption.

[12] When this matter came up for hearing before me on 31 January 1996, Mr Cheow Wee, counsel appearing for the petitioner submitted that the respondent, in the affidavit filed on 24 January 1996, admitted that the amount to be recovered from arbitration would not be sufficient to pay all the creditors. Mr Visvanathan appearing for the respondent submitted that the arbitration hearing had been completed and counsel had handed over their written submissions. The matter was at that time awaiting the decision of the arbitrator and on that ground a winding-up order should not be made against the respondent.

[13] I adjourned the matter for decision in order to enable me to peruse the numerous affidavits being filed and the authorities submitted by the parties. When this matter came up for hearing again on 19 September 1996, three other creditors filed their notices of intention to appear in support of the petition. En Azhar Azizan Harun appearing for the respondent informed the court that the arbitrator had awarded a sum exceeding RM5 million to the respondent. That would be sufficient to pay the petitioner and other creditors. He then requested for an adjournment of three months so as to enable the respondent to recover the sum awarded and to pay all the creditors. Mr Stanley, counsel for the petitioner, requested for security of some sort. En Azhar Azizan Harun said he was not able to give the security. Ms CM Teh who appeared for Ice Far East Pte Ltd, a supporting creditor, stated that she had no objection but informed the court that her client had filed another petition to wind-up the respondent. In view of the likelihood of a settlement as indicated by En Azhar Azizan Harun, I acceded to the request for an adjournment.

[14] When this matter came up for hearing on 7 January 1997, En Azhar Azizan Harun, who again appeared for the respondent, informed the court that the sum recovered under the award was RM6 million. The respondent had succeeded in obtaining an execution order for that amount from the High Court. MBf Builders agreed to pay RM1 million a month commencing January 1997. It needed about six months to recover the full RM6 million. He then requested for the matter to be adjourned for another six months. Mr Stanley Sinnappen, who appeared for the petitioner agreed this matter be adjourned for about four months. The counsel appearing for the other creditors supporting the petition also had no objection to the adjournment. The matter was then adjourned.

[15] On 19 June 1997, when this matter came up before me, En Azhar Azizan Harun who appeared for the respondent informed the court that he would give his solicitor's undertaking to release RM500,000 to the solicitors for the petitioner by 23 June 1997 as part settlement. He then asked for the matter to be adjourned for another six months. Counsel who appeared for the creditors did not object to the application for adjournment. This matter was adjourned to 15 December 1997.

[16] On 15 December 1997, when the parties appeared before me, the learned counsel for the appellant informed the court that the respondent was unable to pay all the creditors despite the solicitor's undertaking given by him earlier. There was no mention what happened to the award of RM6 million. Taking the adjournments given into account, the respondent should have recovered the full amount awarded before that date (15 December 1997). Onthat day it became clear to me and to the creditors that the request for those adjournments was to give the respondent time to collect the award but the respondent never intended to pay its creditors. The submission by the respondent's counsel that the amount to be recovered was more than enough to satisfy the creditors was only to appease the creditors and to get the adjournments. When the respondent's counsel informed the court on 15December 1997 that the respondent was unable to pay its creditors the whole truth about the respondent came out. It was with regret that I had to adjourn the hearing of the petitioner's petition on that date due to the fact that the official assignee was not present. This was because all the creditors were of the view that the matter would be settled. The matter was then adjourned to 26 January 1998.

[17] On 26 January 1998, the respondent's counsel raised a preliminary objection on the ground that notice of demand was not served in accordance with s 218(2)(a) of the Act. The petitioner failed to serve the notice of demand by leaving the notice at the registered office of the respondent. In support of that the counsel cited the case of *Re Ken Bina Sdn Bhd; Evergrip Prestressing Sdn Bhd v Ken Bina Sdn Bhd* reported in CSLR XX[6089]. The second ground raised by the respondent was the issue of the deferment of the payments.

[18] In reply the learned counsel for the petitioner submitted that the respondent had admitted the amount owing as shown in encl 11 of exh ET–1 which was the confirmation of the balance. As to the service of the demand notice, the petitioner's counsel referred to the case of *Weng Wah Construction Co Sdn Bhd v Yik Foong Development Sdn Bhd* [1994] 2 MLJ 266 where following the decision in a New Zealand case of *South Seas Development Ltd v Commercial Advances Nominees Ltd* [1976] 1 NZLR 679, it was held that proof of actual physical delivery by a postal officer of a registered letter containing a notice of demand at the registered office of the company could be effective service within the terms of s 218(2)(a) of the Act as what is important is the adequate proof of physical delivery by the creditor. The obvious underlying requirement is that there must be adequate proof of physical delivery to the respondent. In the present case the requirement has been fulfilled when the notice of demand was delivered to the registered office of the respondent by AR registered post. Furthermore, the respondent had entered appearance and filed a notice to oppose the petition. In addition the respondent had also filed the affidavit opposing the petition and several other affidavits. The respondent knew what was the case against them. The respondent was not prejudiced at all even if the notice of demand was not properly served. The preliminary objection is hereby dismissed.

[19] In the present case, the respondent admitted in the affidavit the amount owing to the petitioner but claimed that the petitioner had agreed to defer the payment. It was not disputed a meeting took place between the representatives of the petitioner and the representatives of the respondent. Though the issue of deferred payment was raised, it is obvious to me that the petitioner did not agree to the deferred payment because the respondent could not meet one of the conditions, ie Mr Teoh's wife to give her personal guarantee. Even assuming that there was an agreement to defer the payment, it was to be deferred only until the award by the arbitrator. In the present, case it is clear from the submissions that the appellant had received the award amounting to almost RM6 million. After the award had been recovered, the respondent did not pay the amount of RM809,100.66 to the petitioner despite the solicitor's undertaking of depositing RM500,000 with the petitioner's solicitors. In my view, if the RM500,000 had been deposited, the solicitors for the petitioner should have mentioned it in court.

[20] Before I conclude, permit me to say about the respondent and its solicitors. I find that the conduct of the respondent and its solicitors in this petition is much to be desired especially on the part of the solicitors. They made all sorts of excuses to have the petition adjourned. At the beginning, the respondent collected about 19 purported creditors to file notices to oppose the petition. The purported creditors also filed affidavits. It is clear to me that the notices and the affidavits were prepared and filed by the same firm of solicitors who were acting for the respondent. When the other creditors filed

notices to appear in support of the petition the nineteen purported creditors disappeared from the scene. The purported creditors appeared through their counsel, Mr Visvanathan where he requested for an adjournment on the ground that the creditors wanted to file their affidavits opposing the petition. In the affidavits they merely stated the amount of debts due from the respondent but did not explain how the debts came into being. It is difficult for this court and the official assignee to verify those claims. In my view, the notices were filed in order to get an adjournment. When this matter came up for hearing the third time these purported creditors did not appear. No explanation was given why they did not appear.

[21] When this matter came up for hearing again on 31 January 1996, this court was informed by the learned counsel for the respondent that the arbitration hearing had been completed and awaiting the decision of the arbitrator. The respondent's counsel further submitted that the award prayed for by the respondent in the arbitration exceeded the amount owing to the petitioner. Ifsuccessful the award would be more than enough to satisfy the amount due to the petitioner as well as other creditors on record. Based on this assertion, the respondent requested for an adjournment. Though the petitioner objected to the adjournment, I allowed the adjournment in view of the submission of the counsel for the respondent.

[22] When this matter came up for hearing on 19 September 1996, the respondent's counsel submitted that the arbitrator had awarded the sum exceeding RM5 million which amount would be more than enough to satisfy all the creditors. The respondent then requested for six months adjournment in order for the respondent to recover the money from MBf Builders. I adjourned the matter to another date. When this matter came up for hearing on 7 January 1997, the counsel for the respondent again requested for an adjournment. The counsel informed the court that they have filed an originating summons to execute the award. The High Court had given the order. On the strength of that order MBf Builders offered to pay the award by monthly instalments of RMl million and as such it would take six months to recover the full amount due under the award. The matter was then adjourned for another six months.

[23] When this matter came up for hearing again on 19 June 1997, the counsel again asked for an adjournment of six months and this time the counsel came up with a new gimmick that he would give his solicitor's undertaking of releasing the sum of RM500,000 to the petitioner's solicitors. Since there was no objection from all the parties present, I adjourned the matter for another six months. When this matter came up for hearing again on 15 December 1997, the whole scenery changed. The learned counsel for the respondent submitted that the respondent could not pay the creditors. There was no mention of the award money despite the solicitor's undertaking given earlier. Only then I realized that both the respondent and their solicitors were making use of the court to delay the petition in order for the respondent to collect the award

which exceeded RM5 million. Instead of paying the creditors, the respondent dissipated the award and leaving the creditors high and dry. There is no doubt in my mind that the solicitors for the respondent and the counsel had a hand in this scheme.

[24] For the reasons I have stated above, I allowed the prayers prayed for by the petitioner in their petition dated 6 April 1995 with costs.

Application allowed.

Reported by Lim Lee Na